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No. 217

In the Supreme Court of the United States

OCTOBER TERM, 1940

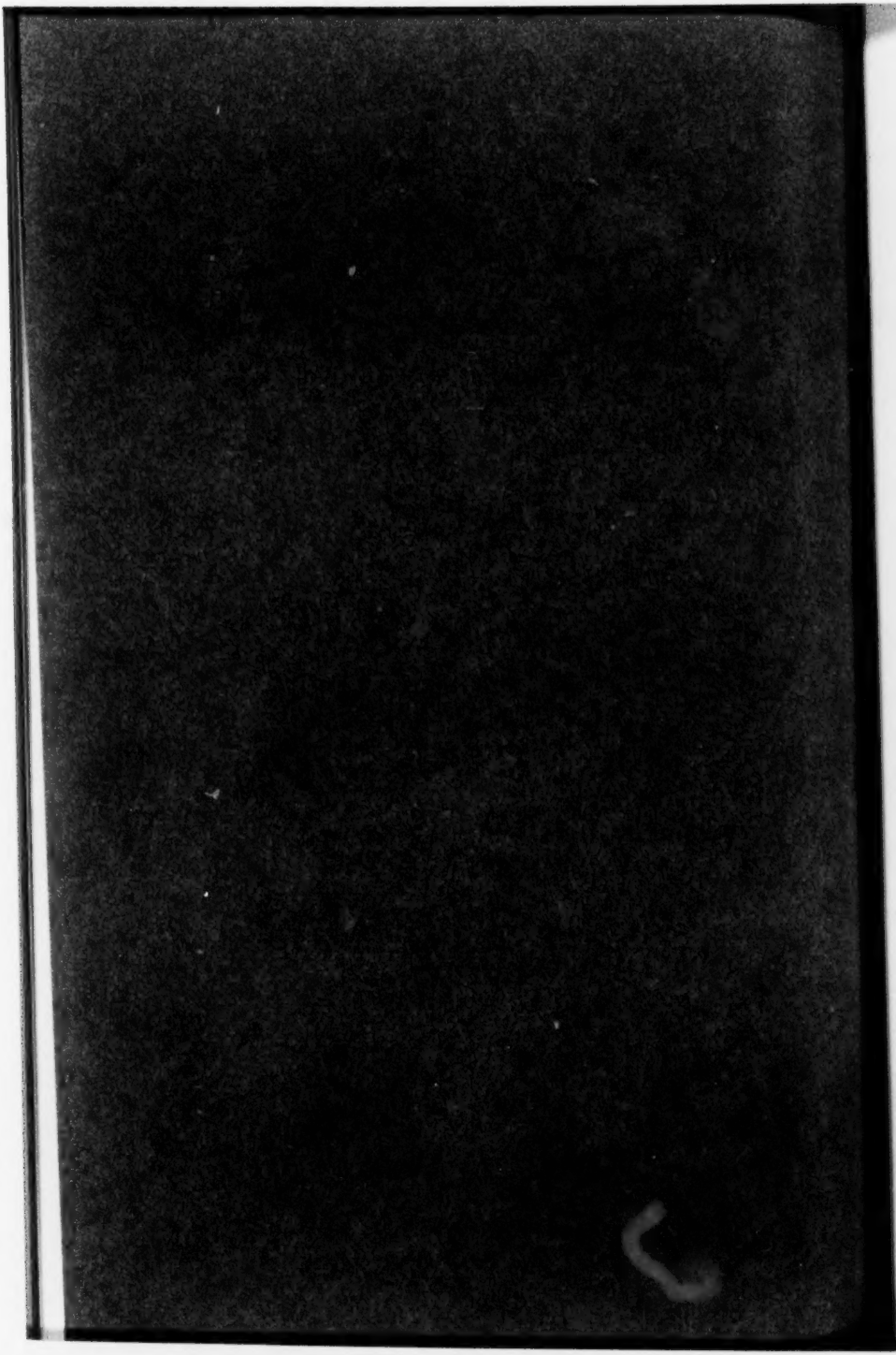
RALPH B. KELLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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OPINIONS BELOW

The opinion of the District Court (R. 8–9) is not reported. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 288–292) is reported in 110 F. (2d) 922.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 9, 1940 (R. 292–293). The petition for a writ of certiorari was filed on July 8, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Under Section 19 of the World War Veterans' Act the running of the six year period of limitation is suspended from the time a claim for insurance benefits is filed in the Veterans' Administration until the claim is denied by the Administrator of Veterans' Affairs. The question is whether the statute again began to run when petitioner's claim was denied by the Insurance Claims Council, an agency within the Veterans' Administration acting under authority delegated to it by the Administrator.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations appear in the Appendix, *infra,* pp. 14–22. The limitation provision directly involved, contained in Section 19 of the World War Veterans' Act (U. S. C., Title 38, Sec. 445), is as follows:

* * * * *

> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930 * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial

of said claim by the Administrator of Veterans' Affairs. * * *

STATEMENT

Petitioner brought suit in the United States District Court for the Western District of Missouri on May 18, 1938, alleging that he became totally permanently disabled on May 1, 1929, while his contract of yearly renewable term insurance was in force (R. 1–7). Respondent moved to dismiss the petition on the ground that the right of suit was barred by the statute of limitations, which motion was overruled (R. 8–9). Respondent's answer denied that petitioner became totally permanently disabled on May 1, 1929[1] (R. 13). A jury trial resulted in a verdict and judgment for the petitioner, after the District Court overruled respondent's motion for a directed verdict (R. 266). Upon appeal, the Circuit Court of Appeals for the Eighth Circuit reversed, because the right

[1] Other material facts established by the pleadings and by a stipulation of the parties are that the policy sued on was issued to the petitioner on September 2, 1918 (R. 24); that it provided for payment to him in the amount of $57.50 per month, in the event he became totally permanently disabled while the policy was in force (R. 4, 11); that the policy lapsed on February 1, 1925 for nonpayment of premiums, but that, by reason of the provisions of Section 305 of the World War Veterans' Act (U. S. C., Title 38, Sec. 516), the policy was revived on May 1, 1929, and matured on that date if petitioner then became totally permanently disabled as alleged (R. 24–25).

of suit was barred by the statute of limitations. It therefore did not rule upon the appeal from the denial of respondent's motion for a directed verdict.

The facts relating to the question of limitations were submitted in an agreed statement of facts and exhibits which, in substance, together with undisputed pertinent provisions of law, are as follows:

The applicable period of limitations is six years (Sec. 19, World War Veterans' Act, Appendix, *infra,* p. 15), which commenced to run on May 1, 1929, the date upon which petitioner claims to have become totally permanently disabled.[2] On May 20, 1931, petitioner filed a claim for insurance benefits in the Veterans Administration (R. 26), which suspended the running of limitations. The Insurance Claims Council, a subordinate agency within the Veterans Administration, denied this claim on August 24, 1932, and gave petitioner notice of the denial in a letter dated August 27, 1932 (R. 29–30). The letter, in material part, read:

> You are informed that a decision was rendered on August 24, 1932, by the Insurance Claims Council to the effect that the evidence is not sufficient to establish as a fact that the former insured was totally and permanently disabled at the time when the

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[2] Pet. 10; and see *United States* v. *Towery*, 306 U. S. 324, rehearing denied, 306 U. S. 668.

contract of insurance was in force, and therefore the claim has been denied.

You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended.

If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record.

No further action was taken by either party until October 19, 1937, when, through his attorney, the petitioner again wrote to the Veterans Administration demanding payment of insurance benefits (R. 244–245). In a letter dated November 4, 1937, the Director of Insurance, adhering to the decision of the Insurance Claims Council of August 24, 1932, advised the petitioner that the claim was denied (R. 30–32). Upon the basis of a letter from petitioner's attorney, dated November 9, 1937, the Insurance Claims Council again considered the claim and rendered a decision denying it on January 31, 1938 (R. 33). Upon appeal, this decision was affirmed by the Board of Veterans' Appeals in a decision rendered on May 4, 1938 (R. 32–35).

If, as held by the Circuit Court of Appeals, the suspension of the limitation which commenced

when the petitioner's claim was filed on May 20, 1931, ended upon notice to petitioner of the denial of the claim by the Insurance Claims Council on August 24, 1932, the suit instituted on May 18, 1938, is barred. If, as petitioner contends, the suspension of the limitation did not end with the denial of the claim on August 24, 1932, but continued until the decision of the Board of Veterans' Appeals was rendered on May 4, 1938, the suit is timely.

ARGUMENT

The petitioner contends (1) that the denial by the Insurance Claims Council on August 24, 1932 was not a disagreement,[3] and (2) that the suspension of limitations invoked by his filing of claim on May 20, 1931 was not terminated until a disagreement as defined by statute arose. Without deciding that the suspension necessarily continued until a disagreement arose, the Circuit Court of Appeals held that the denial of August 24, 1932 was a disagreement.

1. The decision of the court below, that the denial by the Insurance Claims Council was a disagreement and terminated the suspension of the statute of limitations, followed *Simmons* v. *United States,* 110 F. (2d) 296, on rehearing, 111 F. (2d) 618 (C. C. A. 4th), and accords in principle with

[3] He relies upon the definition of disagreement contained in an amendment to Section 19 of the World War Veterans' Act on July 3, 1930 (Appendix, *infra*, p. 16). See also House of Representatives Report No. 11 (Appendix, *infra*, pp. 19–21).

Frederick v. *United States,* 294 U. S. 695; *Ball* v. *United States,* 101 F. (2d) 272 (C. C. A. 6th), certiorari denied, 308 U. S. 563; *Williams* v. *United States,* 108 F. (2d) 1023 (C. C. A. 6th), certiorari denied, No. 860, October Term, 1939; *Burns* v. *United States,* 101 F. (2d) 83 (C. C. A. 2d); and *Harris* v. *United States,* 72 F. (2d) 982 (C. C. A. 4th). There is no decision of any appellate court in conflict.[4]

The petitioner relies upon the amendment of July 3, 1930, to Section 19 of the World War Veteran's Act, defining "disagreement" as a denial on appeal to the Administrator, while the decision below was based upon the amendment of January 28, 1935, to Section 19 (Appendix, *infra,* pp. 16–17). The latter amendment provides:

> A denial of a claim for insurance by the Administrator of Veterans' Affairs or any employee or agency of the Veterans' Administration heretofore or hereafter designated therefor by the Administrator[5] shall consti-

[4] Petitioner has suggested that the question was decided in a way "probably in conflict with applicable decisions of this Court" (Pet. 5), but has indicated no such decision considered by him to be in conflict. *Rosario* v. *United States,* 106 F. (2d) 844 (App. D. C.), certiorari denied, 308 U. S. 606, not relied upon by petitioner as in conflict, followed the decision in *United States* v. *Bollman,* 73 F. (2d) 133 (C. C. A. 8th), and was distinguished in the opinion on rehearing in *Simmons* v. *United States,* 111 F. (2d) 618, *supra.*

[5] By Regulations Nos. 3200, 3201, and 3204, promulgated by the Administrator of Veterans' Affairs on November 1,

> tute a disagreement for the purposes of section 445 of this title. This section is made effective as of July 3, 1930, and shall apply to all suits pending on January 28, 1935, * * *.

The court below therefore held that the amendment established the denial of petitioner's claim by the Insurance Claims Council on August 24, 1932 as a disagreement, regardless of whether it would have been a disagreement in the absence of that amendment, so that the statute of limitations started running (R. 291). The ruling is the converse of the decision of this Court in *Frederick* v. *United States, supra,* that under the amendment of January 28, 1935, a denial of Frederick's claim for insurance benefits by the Insurance Claims Council on November 4, 1932, was a disagreement sufficient to permit suit to be brought.

The provision in the amendment of January 28, 1935, making it effective as of July 3, 1930, leaves

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1931 (Appendix, *infra*, pp. 17–19), the Insurance Claims Council had been vested with authority to finally deny a claim for insurance benefits, subject only to the right of appeal to the Administrator within sixty days. This authority was conferred upon the Insurance Claims Council by the Administrator under authority vested in him by Section 5 of the World War Veterans' Act (Appendix, *infra*, p. 14), which provides, in part, that: "All officers and employees of the Veterans' Administration shall perform such duties as may be assigned them by the Administrator. All official acts performed by such officers or employees specifically designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person."

no room for doubt that retroactive application of the statute was intended.[6]

The decision below results in no hardship or inequitable treatment, but is consistent with the view that claimants are entitled to such rights as they have taken action to preserve for themselves under the Act of July 3, 1930. Claimants who, considering that the Act of July 3, 1930 required a denial upon appeal to the Administrator before suit could be brought, took an appeal to the Administrator within the time prescribed by regulations, have been held to be entitled to a suspension of limitations until a denial of the claim upon appeal. *Danner* v. *United States,* 100 F. (2d) 43 (C. C. A. 8th); see *Howard* v. *United States,* 97 F. (2d) 987 (C. C. A. 6th); *Harris* v. *United States,* 72 F. (2d) 982 (C. C. A. 4th). Likewise, claimants who brought suit upon a denial by the Insurance Claims Council without taking an appeal have been held protected by the amendment of January 28, 1935. *Frederick* v. *United States,* 294 U. S. 695, *supra; James* v. *United States,* 87 F. (2d) 897 (C. C. A. 8th). Petitioner's present predicament is due entirely to the fact that he neither brought timely suit when his claim was denied by the Insurance Claims Council, as did Frederick, nor took a timely

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[6] Further evidence of such intention is contained in the report of the Committee of the House of Representatives on World War Veterans' Legislation, recommending enactment of the legislation of January 28, 1935 (H. Rep. No. 11, 74th Cong., 1st Sess., Appendix, *infra*, p. 19).

appeal to the Administrator of Veterans' Affairs, as did Danner, to prevent the denial by the Insurance Claims Council from becoming final.

Since there is no limitation upon the right to file a claim for insurance in the Veterans Administration, or upon the power and duty of the Administrator to consider claims, it is not significant that the Veterans Administration considered the petitioner's claim after the right to sue thereon was barred. Compare *Ball* v. *United States,* 101 F. (2d) 272 (C. C. A. 6th), certiorari denied, 308 U. S. 563; *Burns* v. *United States,* 101 F. (2d) 83 (C. C. A. 2d); *Jenkins* v. *United States,* 86 F. (2d) 123 (C. C. A. 5th); and *Dowell* v. *United States,* 86 F. (2d) 120 (C. C. A. 5th). There is nothing in the statute restricting Veterans Administration consideration of a claim, regardless of the lapse of time, and even a judicial determination that suit is barred would not preclude administrative payment upon a finding that the insurance had matured.[7] The administrative reconsideration is, therefore, irrelevant to the statutory limitation upon bringing suit.

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[7] For this reason, the Court will note, the limitation problems of the War Risk litigation differ somewhat from those of the Internal Revenue litigation. But even in the latter field a reconsideration by the Commissioner after the statutory period would not start a new period of limitation for bringing suit. *United States Trust Co.* v. *United States,* 23 F. Supp. 476 (C. Cls.); *United States* v. *First National Bank,* 102 F. (2d) 907 (C. C. A. 7th), certiorari denied, 307 U. S. 641.

2. Even if it were assumed that the denial of the petitioner's claim on August 24, 1932 was not a disagreement, petitioner's suit would yet be barred. As pointed out in the opinion of the District Court (R. 9), there is a difference between the requirements of the statute with respect to the termination of the suspension of limitations and the existence of a disagreement.

The World War Veterans' Act has provided in Section 19 (since May 29, 1928, when the first limitation provision was enacted) (Appendix, *infra*, p. 16), that the suspension of limitations authorized in that section should cease on the denial of the claim "by the director"[8] and in Section 5, as enacted on June 7, 1924 (Appendix, *infra*, p. 14), that all official acts performed by officers or employees specially designated therefor by the director "shall have the same force and effect as though performed by the director in person". Since the denial of petitioner's claim by the Insurance Claims Council on August 24, 1932 had the same force and effect as a denial by the Administrator, the suspension of the limitation must be regarded as terminated thereby under the plain provision of the statute, without regard as to whether that

[8] By Executive Order No. 5398, issued on July 21, 1930, pursuant to legislation enacted on July 3, 1930 (c. 863, Sec. 1, 46 Stat. 1016), all power and authority previously lodged in the Director of the United States Veterans' Bureau was vested in the Administrator of Veterans' Affairs.

denial also constituted a disagreement sufficient to permit suit to be brought.[9]

The purpose of the suspension provision was to prevent the running of the limitation period during the time the claim was not within the control of the claimant. This purpose would be achieved by regarding the suspension as having terminated when, upon a denial of a claim by the Insurance Claims Council, not appealed from, administrative consideration of the claim ceased, regardless of whether there was a disagreement and, therefore, an immediate right to sue. The purpose of the limitation in Section 19, which is a statute of repose (*United States* v. *Towery,* 306 U. S. 324), would be defeated if, as is implicit in the petitioner's contention, the running of limitations might be suspended indefinitely at the option of the claimant by inaction at a time when no administra-

[9] Section 19 has, from its first enactment, required a disagreement as a condition to the bringing of suit, but originally the term was not defined. The amendment to the World War Veterans' Act of July 3, 1930, defined a disagreement as "a denial of the claim by the [director] or someone acting in his name on an appeal to the [director]" and the Acts of January 28, 1935, and June 29, 1936, contained further definitions of that term. That the original provisions with respect to the termination of the suspension have remained unchanged, while the administrative action constituting a disagreement has three times been the subject of Congressional action, appears significant of an intention on the part of Congress to differentiate between the administrative action terminating the suspension of limitations, and the administrative action constituting a disagreement.

tive consideration of the claim was pending and when, therefore, there was nothing to prevent further action by the claimant.

CONCLUSION

The decision of the court below is correct, and is not in conflict with any other decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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